IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. Appeal No. 412 of 2006

Reserved on: 17.8.2007

Date of decision: 11.9.2007

Kishori Lal ... Appellant

Versus

State of H.P. … Respondent

Coram :

The Hon'ble Mr. Justice V.K. Ahuja, Judge.

Whether approved for reporting?[1] No.

For the appellant: Ms. Kamlesh Kumari Advocate.

For the respondent: Mr. Ashutosh Burathoki, Additional. Advocate General.

V.K. Ahuja , J.:

This judgment shall dispose of an appeal filed by the appellant under Section 36 B of the Narcotic Drugs and Psychotropic Substances Act, hereinafter referred to as the N.D.P.S. Act read with Section 374 Cr.P.C., against the judgment passed by the learned Special Judge, Chamba, vide which the appellant was convicted and sentenced under Section 20 of the N.D.P.S. Act to suffer rigorous imprisonment for eight years and to pay fine of Rs.80,000/-. In case of default in the payment of fine, the appellant was to further undergo rigorous imprisonment for two years.

Briefly stated the facts of the case are that on 28.9.2004 PW-1 ASI Ranjeet Singh alongwith PW-6 H.C. Tilak Raj, PW-2 C. Surinder

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[1]Whether reporters of Local Papers may be allowed to see the judgment? Yes.

Kumar, PW-3 C. Kamlesh Kumar and PW-4 Raj Kiran were present at Rajpura Mod at about 11.30 AM when they saw one person who tried to run away on seeing the police party. The said person Kishori Lal was apprehended and on search of the bag being carried by him Charas was recovered, which on weighment was found to be 800 grams. Two samples of 25 gram each were taken from the bulk of Charas and these were separately sealed and taken into possession in accordance with procedure. The Investigating Officer supplied grounds of arrest to the appellant, prepared Ruka and sent the same to Police Station on which case was registered. After registration, the case was filed in the Court and the case was assigned to the learned trial Court by Sessions Judge Chamba, who tried the appellant under Section 20 of the N.D.P.S. Act resulting in his conviction and sentence as detailed above.

I have heard Ms. Kamlesh Kumari, Advocate, for the appellant and Mr. Ashutosh Burathoki, learned Additional Advocate General, for the respondent and have carefully gone through the record of the case.

The first plea raised by the learned counsel for the appellant during the course of arguments was that the provisions of Section 42 of the Act were not complied with since it was a case of prior information and as such, there has been non-compliance of the mandatory provisions of the Act.

A perusal of Section 42 of the N.D.P.S. Act shows that it authorizes a police officer to enter the premises, search, seizure and arrest without warrant. The only requirement is that the said officer should be satisfied that the search warrant or authorization cannot be obtained without affording an opportunity for the concealment of

evidence or facility for the escape of an offender. The said officer is required to take down the information in writing under sub-section (1) or record grounds for his belief under the proviso thereto and sent a copy of the report in writing to his immediate officer superior within seventy-two hours. These provisions will apply to the present facts only in case the Investigating Officer had a prior information that the accused will be coming with Charas. A perusal of the statements of Investigating Officer PW-1 ASI Ranjeet Singh and that of PW-6 H.C. Tilak Raj who conducted the investigation at the spot afterwards does not show that they ever admitted this fact that they had a prior information and that the accused was apprehended on prior information. Their statements clearly show that they suddenly apprehended the accused who tried to run away on seeing the police party and therefore, the provisions of Section 42 of the N.D.P.S. Act do not apply to the present facts. The contention putforth by the learned counsel for the appellant is devoid of any force and I accordingly repel the same.

The second ground taken by the learned counsel for the appellant was that no independent witnesses were associated at the time of recovery and as such, the prosecution story in the absence of independent corroboration to the statements of official witnesses cannot be relied upon.

I have gone through the statements of PW-1 ASI Ranjeet Singh, PW-6 H.C. Tilak Raj, PW-2 C. Surinder Kumar, PW-3 C. Kamlesh Kumar and PW-4 C. Raj Kiran and nothing has come up in their statements that any independent witness was present at the spot or could have been associated at the time of search of the accused. There is nothing in the statements of these witnesses to show that there are

shops or houses near the place of recovery from where independent witnesses could have been called and associated at that time.

A perusal of the site plan Ext. PE shows that on the one side of the metalled road there was forest and on the other side, trees have been shown near which the accused was apprehended. There is nothing in this site plan or in the statements of the witnesses recorded by the prosecution that there existed any houses, shops or any vehicles passed or persons were present at that time who could have been associated at the time of search of the person of the accused. Once the recoveries were effected suddenly at lonely place and there were no houses or shops nearby, it cannot be said that it was possible for the Investigating Officer to have called any independent witness from the nearby place. In the evidence of the principal witnesses referred to above, it has also come up that the place of recovery was a Sunsaan place and at times this word Sunsaan has been mentioned as Shamsan or burial place, though the witnesses have denied that there is any Shamshan or burial place near the place of recovery. Thus, it is clear that in view of the facts of the case and the place of recovery it was not possible for the Investigating Officer to have associated any independent witness and as such, the compliance of Section 100 Cr.P.C. could not have been made. The learned trial Court has considered this point that the statements of official witnesses cannot be discarded merely because of their official status in the absence of independent corroboration and as such, statements of official witnesses cannot be disbelieved particularly when there is nothing on record to show that the police officials had any enmity with the accused to falsely implicate him. The contention putforth in this regard falls squarely on the ground.

The next point raised by the learned counsel for the appellant was in regard to the minor contradictions in the statements of the official witnesses i.e. on the point as to whether the Charas was round shape or Batinuma and as to the effect of these contradictions. PW-1 ASI Ranjeet Singh has stated that Charas was in the shape of balls. PW-2 C. Surinder Kumar has also stated that the Charas found was in the shape of balls. PW-3 C. Kamlesh Kumar has not stated about the shape of the Charas. PW-4 C. Raj Kiran has also stated that the Charas was in the shape of balls. PW-6 H.C. Tilak Raj has also stated that the Charas was in the shape of balls. The only contradiction pointed out was that in the Memo Ext. PC it was mentioned that the Charas recovered was 'GOLDAR BATINUMA'. In recovery memo Ext. PA also the shape of the Charas has been mentioned as 'GOLDAR BATINUMA' and the witnesses as discussed above have clearly stated that the Charas was in round shape. Merely the fact that the word round was used in the statements while in the recovery memo and memo word Batinuma was also used in addition to round shape. It cannot be said that there was any contradiction in the statements of the witnesses or that this was material contradiction so as to disbelieve the prosecution story. The contention putforth by the learned counsel for the appellant is devoid of any force and it cannot be accepted.

The next point urged by the learned counsel for the appellant was that a sample of 25 gram was taken by the Investigating Officer, while in the laboratory its substance was found to be only 20.2966 grams and as such, there was a contradiction in the weight of the sample and therefore, the prosecution case does not stand proved that the same sample was sent which was recovered at the spot. This

plea was also considered by the learned trial Court rightly that the sample must have been weighed in the laboratory in accordance with modern weighing scale, while at the spot it must have been weighed in the traditional scale and there is likely to be some variation in these two methods adopted by different persons for weighing sample. A perusal of the report of the Chemical Examiner Ext. PD shows that seals were found intact on the sample so received and this minor contradiction in weight does not lead to the inference that the same sample was not sent to the expert and, therefore, the contention put forth by the learned counsel for the appellant falls squarely on the ground.

I have gone through the evidence of the witnesses recorded by the prosecution and it is clear that the statement of PW-1 ASI Ranjeet Singh has been duly corroborated by the statements of other members of the raiding party mentioned above and there are no material contradictions or infirmities in the statements of these prosecution witnesses which have to be relied upon. Copy of the special report was also sent to the Superintendent of Police and there was compliance of mandatory provisions of the Act and, therefore, the findings of the learned trial Court holding the appellant guilty call for no interference by this Court and as such, are liable to be affirmed.

The last point urged by the learned counsel for the appellant was that in the sample of Charas sent to the laboratory, the resin content was found to be 28.36% only and, therefore, it cannot be said that the recovered substance was Charas weighing 800 grams and it has to be held that the recovered Charas was only 28.36% of total 800 grams recovered at the spot which comes to little less than 1/3rd of the total substance recovered. Accordingly, it was submitted that the total

recovered Charas was only about 267 grams. The learned counsel for the appellant relied upon a decision of Division Bench of this Court and according to the said decision, the quantity of the Charas recovered in this case can not be said to be 800 grams as per the reasoning given by the Division Bench of this Court. Thus it was submitted that the appellant is entitled to punishment provided for recovery of small quantity only.

Reliance was placed upon a decision of Division Bench of this Court in **Dharam Pal** Vs. **State of H.P.**, **Latest HLJ 2007 (HP) 827**. A perusal of this judgment shows that a question was raised before the Division Bench that in case the percentage of resin found in the content of Charas is less than the recovered Charas, the quantity of resin found can be said to be Charas and not the whole quantity recovered from possession of the accused. Accordingly, it was held that the sentence has to be imposed keeping in view the quantity of resin found in the total quantity of Charas recovered from the possession of the accused. A perusal of the said judgment of the Division Bench shows that a similar plea was raised before the Bench and in that case the quantity of Charas recovered was 1.600 grams, but the chemical examiner on the analysis of representative of the sample of the stuff found that it contained only 28.92% resin and accordingly had referred to the term cannabis, charas, ganja etc. The Division Bench finally concluded that since the report of the chemical examiner shows that percentage of resin found was 28.92% and it was silent about the rest of the contents of the stuff which means that the entire quantity of the recovered stuff was not Charas. The learned Additional Advocate General appearing for the State had submitted that there are no definite

findings of the chemical examiner that apart from the percentage of the resin found in the stuff, rest of it was not Charas or it contained some other substance. It was submitted on behalf of the State that there is nothing in the report to suggest that the other part of the substance recovered was mixture of gur, dhoop or some other extraneous substance which was mixed with Charas and as such, it cannot be said that only percentage of resin found in the substance recovered was Charas and not the remaining substance recovered from the possession of the accused. This question cannot be considered by this Court on the basis of the arguments raised by the learned Additional Advocate General since this question has been discussed at length by the Division Bench of this Court which had finally concluded that only the percentage of the resign found in the substance can be termed as Charas and not the remaining substance. Once there are findings of the Division Bench about this aspect, this plea is not open to be considered before this Court which is bound by the Division Bench ruling of this Court.

Applying the decision in the above case in which it was held that recovered stuff was Charas only to the extent of resin content found therein and accordingly, it has been concluded that since in the present case the resin content found was 28.36% approximately 1/3rd, it can be concluded that the Charas recovered from the possession of the accused was 1/3rd of the total substance i.e. about 267 grams only. However, the punishment prescribed under Section 20 of the Act remains the same since in case Charas found was above 100 grams which is above small quantity since small quantity is less than that, therefore, the conviction prescribed remains the same under clause (B) i.e. for quantity less than commercial quantity but greater than small

quantity and the punishment prescribed is rigorous imprisonment for ten years or fine which may extend to one lakh rupees. The punishment awarded by the learned trial Court is rigorous imprisonment for eight years and fine to the extent of Rs.80,000/-.

The last point raised by the learned counsel for the appellant was on the point of sentence and it was submitted that applying the decision of the Division Bench to the facts of the case and the fact that the Charas recovered can be said only about 267 grams, the substantive sentence imposed upon the appellant deserves to be reduced keeping in view the punishment prescribed. The sentence imposed is reduced to rigorous imprisonment for three years and fine which shall extent to Rs.30,000/-. In default of payment of fine, the appellant shall undergo rigorous imprisonment for a period of one year.

Keeping in view the above discussion, the appeal filed by the appellant is partly accepted to this extent that the sentence awarded by the learned trial Court is reduced to rigorous imprisonment for a period of three years. The fine is also reduced to Rs.30,000/- and in default, the appellant shall undergo rigorous imprisonment for a period of one year.

The learned trial Court shall take steps that the appellant serves the sentence and fresh jail warrant be issued accordingly by the trial Court. The information regarding deposit of fine shall also be sent to this Court as and when the fine is realized. A copy of the judgment alongwith record be returned to the learned trial Court.

(V.K. Ahuja),
Judge

September 11, 2007
(BSS)